BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own motion, seeking to investigate and adopt policies for administration of Consumer Choice Programs offered by Jurisdictional Utilities for natural gas service in Nebraska.	)	Application No. NG-0028/PI-97

COMMENTS OF KINDER MORGAN, INC.
ON PROPOSED COMMISSION POLICIES FOR
ADMINISTRATION OF CUSTOMER CHOICE PROGRAMS
OFFERED BY JURISDICTIONAL UTILITIES

In its Order of June 14, 2005, the Nebraska Public Service Commission (Commission) requested written comments on issues pertaining to customer choice programs offered by Nebraska jurisdictional utilities. The "Choice Gas" program of Kinder Morgan, Inc. (Kinder Morgan) presently is the only customer choice program offered by a jurisdictional utility in Nebraska in which each customer can select from a list of participating suppliers. Kinder Morgan first offered a choice gas program in Wyoming in 1996, and has offered its Choice Gas Program in Nebraska since 1998. Kinder Morgan welcomes the opportunity to participate in the Commission's workshop and to share with the Commission and other interested parties its decade of experience with the Choice Gas Program.

I. <u>Commission's List of Issues.</u>

The Commission's Order stated the following non-exclusive list of issues that it wishes to explore by opening this docket:

> 1. Adoption of a standard code of conduct for jurisdictional utilities seeking to offer consumer choice programs, using Kinder Morgan, Inc.'s Code of Conduct in its Nebraska Gas Tariff, General Terms and Conditions, Item No. 38, for purposes of discussion;

2. Production of educational information by the Commission for consumers regarding consumer choice programs, such as pamphlets and website materials, using examples collected by Commission staff from other states for purposes of discussion, available for interested parties to review via Internet links on the Commission's website at www.psc.state.ne.us;

3. Annual reporting requirements for jurisdictional utilities that offer consumer choice programs and competitive natural gas providers that participate in consumer choice programs, including, but not limited to, customer take rates for each gas supplier, the default rate, information on range of rates and offerings available from each gas supplier during a consumer choice program selection period;

4. Whether and how to calculate historic cost comparisons among the gas suppliers for the benefit of consumers and the Commission; and

5. Auditing of consumer choice programs, including, but not limited to, auditing costs of administration of a consumer choice program by a jurisdictional utility.

Section II of Kinder Morgan's Comments provides a brief history of the Kinder Morgan Choice Gas Program in Nebraska. Section III addresses relevant statutes governing choice gas programs, and Section IV contains Kinder Morgan's view on the Commission's role in regulating such programs. Finally, Section V contains Kinder Morgan's detailed comments on the issues set forth in the Commission's Order. Kinder Morgan supports the Commission's decision to omit from discussion in this docket the issue of mandatory choice programs.

II. Choice Gas Program History.

As previously noted, Kinder Morgan first offered a choice gas program in a division of its Wyoming service area, beginning in 1996. The choice gas program in Wyoming is offered under the authority of Kinder Morgan's Wyoming natural gas tariffs, as approved by the Wyoming Public Service Commission. Initially, the program was offered in the Torrington, Wyoming Division to approximately 10,000 customers. Subsequently, the program was expanded to reach each of Kinder Morgan's three Wyoming retail divisions, which currently total approximately 70,000 retail natural gas service customers. Over time, the number of gas suppliers participating in the Wyoming program has varied. Like the Nebraska service area, there are relatively few industrial customers in the Wyoming service areas served by Kinder Morgan. Unlike Nebraska, however, Kinder Morgan also has far fewer retail agricultural customers in Wyoming.

In 1998, Kinder Morgan initiated its Choice Gas Program in Nebraska. The terms and conditions of the Nebraska Choice Gas Program were the subject of much negotiation and compromise among Kinder Morgan, gas suppliers, municipal governing bodies, and gas customers. A balance was achieved among all the parties, and as a result, under the then-effective authority of the Municipal Natural Gas Regulation Act, Kinder Morgan memorialized the terms and conditions of the Choice Gas Program with appropriate filings in each community where the program had been approved for offering. Once the regulatory structure changed in Nebraska, Kinder Morgan filed its initial Choice Gas Program tariffs with the Commission in 2003. Kinder Morgan currently operates its Nebraska Choice Gas Programs under the authority of those Commission-approved just and reasonable tariffs. Importantly, Kinder Morgan's approved Nebraska tariffs recognize the substantial number of seasonal-use, agricultural customers in Nebraska and provide for two separate Choice Gas Programs: the primary program, which is offered to residential, commercial, industrial and non-seasonal-use agricultural customers, and a separate program offered only to seasonal-use agricultural customers.[1] The principal differences between the two Nebraska Choice Gas Programs offered by Kinder Morgan are that (a) the program years and associated milestones are different (the

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[1] The seasonal-use agricultural customers primarily consist of irrigators and customers with grain drying and/or alfalfa dehydrating equipment. Also, Kinder Morgan wishes to correct one of the statements in the Commission's Order, as Kinder Morgan does in fact allow high-volume ratepayers to participate in its Choice Gas Program. High-volume ratepayers in Kinder Morgan's service areas also have the option to utilize unbundled transportation service, which requires monthly fees and additional on-site equipment.

residential-commercial program year begins June 1 of each year, while the seasonal-use agricultural program begins April 1 of each year), and (b) Kinder Morgan reserves firm upstream pipeline capacity for and releases such capacity to suppliers participating in the residential-commercial program. Beginning the residential-commercial program year on June 1 allows suppliers time to get gas into storage, and the April 1 date for the agricultural program coincides with the beginning of the irrigation season. Over time, the number of gas suppliers participating in the Nebraska programs has varied. Kinder Morgan Choice Gas Supply, the Alliance for Community Energy and ONEOK Energy Marketing Company are the gas suppliers currently participating in the residential-commercial program. Post-Rock LLC, Kinder Morgan Choice Gas Supply and ONEOK Energy Marketing Company are the gas suppliers currently participating in the seasonal-use agricultural program.

III. Relevant Statutory Provisions.

Customer choice programs specifically are authorized in Section 66-1851 of the State Natural Gas Regulation Act (Regulation Act). That section provides:

> (1) Notwithstanding any other provisions in the State Natural Gas Regulation Act, a jurisdictional utility may file with the commission rates and one or more rate schedules and other charges, and rules and regulations pertaining thereto, that enable the utility to provide service to ratepayers under customer choice and other programs offered by a utility to unbundle one or more elements of the service provided by the utility.
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> (2) The commission shall not eliminate or modify the terms of any customer choice or other unbundling programs in existence on May 31, 2003, or as thereafter modified by a filing made by the jurisdictional utility, except as permitted by the act after complaint or the commission's own motion and hearing. In any rate determination made under the act, the commission shall not penalize the utility for any action prudently taken or decision prudently made under its approved bundling program, by imputing revenue at maximum rates or otherwise.
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> (3) The commission may not modify the provisions of a program under this section except upon complaint or the commission's own motion, wherein the commission finds, after hearing, that one or more aspects of the program are unduly preferential, unjustly discriminatory, or not just and reasonable.

IV. <u>The Commission's Role in the Regulation of Choice Gas Programs.</u>

The Legislature did not authorize mandatory choice gas programs when it passed the Regulation Act. Thus, while jurisdictional utilities are authorized to offer such programs under Section 66-1851 of the Act, the Commission may not mandate a customer choice program.. Furthermore, the Commission may order modifications to the program only if it has found, after notice and hearing, that some aspect of the program is "unduly preferential, unjustly discriminatory, or not just and reasonable." Any such determination would be governed by the Regulation Act and by established case law, including the concepts embodied in *New England Power Co.*, 31 FERC ¶ 61,047, *reh. den'd*, 32 FERC ¶ 61,112 (1985), *aff'd sub. nom., Violet v. FERC*, 800 F.2d 280 (1st Cir. 1986) (examining proper deference to the decisions of utility management) and *K N Energy, Inc. v. Cities of Alliance and Oshkosh*, 266 Neb. 882, 670 N.W.2d 319 (2003) (adopting the prudence test articulated in *New England Power*). Under this framework, absent the notice, hearing and findings required by Section 66-1851, the Commission may not take an action that has the effect of changing an existing customer choice or other unbundling program, or require utilities to offer such programs. Kinder Morgan currently operates its Choice Gas Programs under a Commission-approved tariff that contains just and reasonable terms and conditions governing those programs.

Consistent with the approach adopted by the Legislature in the Regulation Act, Kinder Morgan urges the Commission to refrain from taking a "one-size-fits-all" approach to choice gas programs. Although it would be useful to have the Commission adopt general guiding principles, Kinder Morgan strongly believes that overly detailed policies may discourage utilities and gas providers from participating in such programs. In the following issue-by-issue comments,, Kinder Morgan suggests approaches that may assist the Commission in its consideration of pertinent choice gas issues and provide guidance to other utilities and to current and potential gas suppliers.

V. Issue-By-Issue Comments.

Issue 1: Standard Code of Conduct.

> Adoption of a standard code of conduct for jurisdictional utilities seeking to offer consumer choice programs, using Kinder Morgan, Inc.'s Code of Conduct in its Nebraska Gas Tariff, General Terms and Conditions, Item No. 38, for purposes of discussion.[2]

The substance of Section 38 of the General Terms and Conditions of Kinder Morgan's Nebraska Gas Tariff was developed during the first five years of the Nebraska Choice Gas Program. These terms and conditions were modeled after Kinder Morgan's previously-discussed Wyoming choice gas program. Under the then-existing regulatory framework in Nebraska, Kinder Morgan collaborated with community officials, gas suppliers, and customers to develop rules governing (a) Kinder Morgan's multiple roles as program administrator, system operator and participating gas supplier, and (b) the role of all participating gas suppliers, including Kinder Morgan Choice Gas Supply. These rules are specific to Kinder Morgan's Nebraska programs, and address the concerns of all parties actually participating in Kinder Morgan's programs.

Kinder Morgan is concerned that the adoption of a uniform code of conduct as Commission policy or through a subsequent rulemaking proceeding may deter other jurisdictional utilities from implementing customer choice and other unbundling programs as

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[2] The Commission did not append to its Order the text of Section 38 of the General Terms and Conditions of Kinder Morgan's Nebraska Gas Tariff. For the convenience of other participants in this docket, Kinder Morgan has appended that section to these comments.

permitted by Section 66-1851 of the Regulation Act and may likewise pose an obstacle to robust participation by natural gas providers. Therefore, Kinder Morgan believes that a choice gas code of conduct should be embodied in a tariff, as it has been in the past, rather than having it enshrined as a Commission policy or rule. Once codified, the ability to depart from the policy or rule, even where good cause for doing so is shown, is difficult. However, Kinder Morgan acknowledges that general principles for utilities wishing to develop a choice gas program and adopt a code of conduct would be useful. The general principles then would be used to develop company-specific choice gas terms and conditions that are embodied in a Commission-approved tariff. Accordingly, Kinder Morgan suggests the following code of conduct components for discussion during the Commission's workshop:

- **Separate Accounting Records.** If a jurisdictional utility or its affiliate participates in a Choice Gas Program, separate accounting records for revenue and costs should be maintained relative to the activities of the utility or affiliate as a participating supplier in the Choice Gas Program.

- **Shared Facilities and Employees.** If a jurisdictional utility shares employees, facilities or services with an affiliate that is a participating supplier in a Choice Gas Program, the Choice Gas activities of such shared employees, facilities or services should be separately accounted for. Similarly, no Choice Gas supplier should obtain free use of municipal facilities, services or employees.

- **"Level Playing Field".** A jurisdictional utility should not operate its utility system or manage a Choice Gas Program in a manner that would grant an unreasonable preference or advantage to its own or affiliated gas supplier activities, or subject any other participating suppliers to an unreasonable disadvantage.

- **Disclosure of Information.** A jurisdictional utility should utilize customer and utility information so that it does not obtain any unreasonable preference or advantage over any other participating supplier. Whenever a utility customer requests information about gas suppliers participating in the Choice Gas Program, the utility should provide a list of all qualified and participating suppliers, without expressing a recommendation for any particular supplier.

- **Application of Tariff Provisions.** A jurisdictional utility must apply tariff provisions relating to the Choice Gas Program in a non-discriminatory manner.

- **Marketing Activities.** A jurisdictional utility's Choice Gas services should be marketed and advertised separately from any marketing or advertisement of the utility's regulated services.

- **Representations About Service.** A jurisdictional utility participating directly or through an affiliate in a Choice Gas Program should not represent that the cost, quality or reliability of regulated utility services will be adversely affected if a customer selects a particular gas supplier. Similarly, no supplier under a Choice Gas Program should represent that the quality or reliability of the gas provided by any other supplier, or the regulated services of the jurisdictional utility, will be adversely affected under the Choice Gas Program.

- **General Principles Applicable to All Suppliers.** A supplier under a Choice Gas Program must not:

  (a) Misrepresent the commodity price of any other supplier;

  (b) Market or advertise its commodity services in a manner that misleads customers;

  (c) Engage in activities detrimental to the customer, in the supplier selection process, including activities such as slamming or cramming; and

  (d) Unduly discriminate against similarly situated customers.

Issue 2: Production of Educational Material.

> Production of educational information by the Commission for consumers regarding consumer choice programs, such as pamphlets and website materials, using examples collected by Commission staff from other states for purposes of discussion, available for interested parties to review via Internet links on the Commission's website at www.psc.state.ne.us.

Kinder Morgan generally supports the willingness of the Commission to assist in the production of educational materials regarding applicable customer choice or other unbundling programs offered by jurisdictional utilities. However, Kinder Morgan, in cooperation with participating gas suppliers, already provides educational materials to Choice Gas Program customers. Therefore, rather than developing an entirely new set of materials, it might be more productive for the Commission's staff to review and comment on Kinder Morgan's educational materials, and then post the revised materials to the Commission's website and otherwise distribute them to interested parties. Kinder Morgan's goal in providing educational materials has been to explain the Choice Gas Programs without making the process seem so complex as to frustrate and confuse the customer. Kinder Morgan therefore believes that the most productive way for the Commission to achieve this goal will be to use KMI's educational material as the foundation. Kinder Morgan also believes that the Commission's workshop will be an effective forum to address ways in which customer education can be improved for the benefit of all participants in customer choice programs.

Issue 3: Annual Reporting Requirements.

> Annual reporting requirements for jurisdictional utilities that offer consumer choice programs and competitive natural gas providers that participate in consumer choice programs, including, but not limited to, customer take rates for each supplier, the default rate, information on range of rates and offerings available from each supplier during a consumer choice program selection period.

Kinder Morgan already provides certain Choice Gas Program data to Commission Staff on an informal basis, and would be willing to continue providing any material information to the Commission and its Staff in an annual report. However, if it is too onerous, an annual reporting requirement may discourage jurisdictional utilities from participating in a utility's customer choice or other unbundling program. The goal should be to minimize regulatory impacts to participating suppliers and utilities so that customers obtain the benefits of choice. Furthermore, the items suggested for annual reporting may impact confidentiality; although the gas rates charged by Choice Gas suppliers are public information, the manner in which they are derived is not, and we caution the Commission to respect such proprietary information in developing any reporting requirements. During the selection period prices change on a daily basis and sometimes during the same day; rather than the Commission being a clearinghouse for supplier prices and taking on the obligation and cost for accurate price reporting and description, it would be better to have supplier contact information available on the PSC website and direct suppliers to openly post prices during the selection period, including the automatic rollover price, when applicable. Kinder Morgan also believes the Commission should carefully consider the administrative and cost burdens imposed on smaller firms by an annual reporting requirement. Kinder Morgan remains willing to work with the Commission to identify its information needs at the upcoming workshop in order to arrive at reasonable annual reporting guidelines.

Issue 4: Historic Cost Comparisons.

> Whether and how to calculate historic cost comparisons among the suppliers for the benefit of consumers and the Commission.

Kinder Morgan questions the value of historic cost comparison information to the Commission or ratepayers. Gas suppliers participating in the Choice Gas Program generally offer a range of supply options and prices. Thus, unless the cost comparisons are true "apples to apples" comparisons, based on substantially identical terms and conditions, they may cause more harm than good to customers. Kinder Morgan does not object to the Commission collecting cost information over a period of years in order to develop a database. We merely caution the Commission that dissemination of such information without adequate explanation of the differing terms and conditions of service will create confusion and poor choices in the marketplace. Furthermore, as with many economic comparisons, the Commission should bear in mind that past price performance is no guarantee of future performance. For instance, a gas supplier may make some incautious decisions regarding gas supply procurement in order to be able to offer a "cut rate" gas cost to customers in a given year. However, if the supplier's poor economic decisions cause a serious loss of revenue, the supplier is unlikely to offer such low rates in future years.. Finally, the Commission should avoid any implication by participants that the use of price comparisons should be interpreted and broadcast by the "winning" gas supplier as an endorsement of the supplier with the lowest overall rates as calculated by the Commission.

Issue 5: Auditing of Programs.

> Auditing of consumer choice programs, including, but not limited to, auditing costs of administration of a consumer choice program by a jurisdictional utility.

Under the Choice Gas Program, Kinder Morgan recovers the costs that it incurs in administering the program through an annual gas supplier fee charged by Kinder Morgan to the participating gas suppliers. Kinder Morgan would be willing to make an annual filing with the Commission summarizing the cost of administering its consumer choice program and explaining the accounting for the gas supplier fees received by Kinder Morgan. Commission staff would then be able to follow up as necessary with Kinder Morgan (or any other jurisdictional utility offering a Choice Gas Program) to clarify the filing and request any necessary supporting data. Kinder Morgan recommends that this process be referred to as a "review" rather than an audit, as the term "audit" implies a significant level of formality.

VI. Conclusion.

Kinder Morgan appreciates the opportunity to submit these Comments. Kinder Morgan urges the Commission to refrain from adopting overly prescriptive policies or rules governing Choice Gas Programs. Although we recognize that the adoption of a set of general principles for Choice Gas Programs will be useful, an onerous set of regulations may well discourage other jurisdictional utilities and gas suppliers from pursuing the development of Choice Gas Programs in Nebraska. Consistent with the Regulation Act, any concerns by the Commission, customers or participants regarding a Choice Gas Program may be addressed through the Commission hearing process established in the Act.

DATED this 15th day of August, 2005.

RESPECTFULLY SUBMITTED,

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